IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

Misc. Civil Application No.230/2007 in FAST.18072/2006
Minesh s/o Rambhau Parate ..vs..Pratibha M. Parate

Office Notes, Office Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. | Court's or Judge's orders

8548.07

Shri S. V. Sirpurkar, Advocate for applicant.
Shri Kapgate, Advocate for respondent.

CORAM : B. P. DHARMADHIKARI, J.
DATED : 07/12//2007

Heard Shri Sirpurkar, learned counsel for applicant/appellant-husband. He states that appeal under Section 28 of Hindu Marriage Act filed before this Court is challenging the judgment dated 24/07/2006 delivered by Principal Judge, Family Court, Nagpur in Petition No. A-502/2003. The proceedings in petition No. A-502/2003 were initiated by respondent-wife under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. The application has been allowed. It appears, thereafter, while filing appeal, initially it was mentioned that appeal under Section 19 of the Family Courts Act and therefore, the Registry raised objection about limitation pointing out that as appeal has not been filed within 30 days, the application for condonation of 56 days delay was necessary. The Registrar refused registration on 12/12/2006. Before that the appellant/applicant had

filed pursis dated 29/11/2006 pointing that appeal has been preferred under Section 28 of the Hindu Marriage Act which prescribed limitation of 90 days. However, Registrar rejected appeal as it was filed under Section 19 of the Family Courts Act and hence, limitation of 30 days was applicable.

Advocate Sirpurkar has while contending that the provisions of Family Courts Act are applicable in limited areas has contended that in areas to which said Act is not applicable, the provisions of Hindu Marriage Act and Appellate Forum prescribed thereunder is available. He contends that as per Hindu Marriage Act, the jurisdiction to try such Section 9 application is with Civil Judge Senior Division and the appeal against said order lies before the Court to which the appeal from decree of said Court lies. He states that after enactment of Family Courts Act, as Family Courts Act is applicable in Nagpur city, the Court of Civil Judge, Senior Division, is replaced by Family Court and as such, the appeal is required to be filed against the order of Family Court. He further states that right to file appeal also flows from Section 28 of Hindu Marriage Act. Hence, in such circumstances, appeal can not be treated as appeal only under Section 19 of the Family Courts Act. He invited attention to the judgment of Hon'ble Apex Court reported in **2002(2) Supreme Court Cases 73 Savitri Pandey..vs..**

Prem Chandra Pandey to point out that initially even in Section 28 of Hindu Marriage Act limitation prescribed was only of 30 days and the Hon'ble Apex Court then expressed that looking to the nature of controversy in litigation the said appellate period was inadequate and has requested the Government to amend it. He has pointed out that accordingly the period under Section28 (4) has been increased to 90 days by subsequent amendment. He, therefore, argues that period of 30 days for filing appeal prescribed in Section 19 of Family Courts Act is also inadequate. He further states that in any case the appeal must be treated as appeal under Section 28 (4) of Hindu Marriage Act. He points that accordingly the pursis was already filed on 29.11.2006 even before the registration was refused.

Advocate Kapgate states that even if appeal filed be under the provisions of either Hindu Marriage Act or Family Courts Act, the validity of limitation prescribed under Section 19 can not be gone into by this Court while functioning as Appellate Court. He further states that if present application is treated as one for condonation of delay or delay is condoned, the respondent has no objection.

It is apparent that decision in this matter is delivered by the Principal Judge, Family Court in exercise of power under Family Courts Act, 1984. The

Section 19(3) of the Said Act prescribes time limit of 30 days for filing appeal to the High Court against adjudication by Family Court. In the present matter the proceedings are basically under Section 9 of Hindu Marriage Act and the proceedings have been tried by Family Court under the Family Courts Act. The present appellant could have in other areas filed appeal under Section 28 to District Court against the decision of Civil Judge, Senior Division in Hindu Marriage Petition under Section 9 of Hindu Marriage Act. The time limit therefor as already mentioned above is 90 days. In these circumstances as the present appellant has filed pursis mentioning that it should be treated as appeal under Section 28 of the Hindu Marriage Act, the Registry to treat appeal accordingly. It is apparent that limitation in that event is of 90 days and not 30 days. It is, therefore, clear that the appeal is filed under Section 28 during the period of limitation.

The order refusing registration on 12/12/2006 is, therefore, recalled and the office is directed to register appeal and place it for further consideration before the appropriate Forum.

JUDGE.

Jsa